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No. 120, Original

Supreme Court, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

ON EXCEPTIONS TO THE SPECIAL MASTER'S REPORT

**RESPONSE OF PROPOSED HISTORIAN
AMICI TO OBJECTIONS OF THE STATE OF
NEW JERSEY TO MOTION FOR LEAVE TO
FILE BRIEF AS *AMICI CURIAE***

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The New-York Historical Society, the Society for New York City History, Professor Arthur M. Schlesinger, Jr., Professor Richard C. Wade, and Professor Kenneth T. Jackson (collectively, "Proposed Historian Amici") respectfully respond to the Objections of the State of New Jersey to their Motion for leave to file a brief as *amici curiae* in support of the Exceptions of the State of New York in this case.¹ New Jersey attacks the Historian Amici Brief because (1) it urges the Court "to take whatever measures it deems necessary to ensure that the record is complete" before deciding this case and (2) it seeks to put before the Court relevant facts that were "either overlooked or ignored" by both States and the Special Master. Objections at 2. New Jersey's attempt to have leave denied for filing the Historian Brief on these grounds

¹ New Jersey's contrary insinuations notwithstanding and as previously certified pursuant to Supreme Court Rule 37.6, the Historian Brief is the work product solely of the Proposed Amici and their counsel. New York played no part in determining the approach, scope or conclusions of the Brief, and New Jersey's unsupported allegations to the contrary are unwarranted, unfounded, and untrue.

must fail because New Jersey: (1) understates the role and responsibilities of this Court in original cases, (2) misconstrues the role of *amici curiae* in proceedings before this Court, and especially in original cases, and (3) mischaracterizes the stated intent and actual objective of the proposed Historian Brief.

THE COURT'S ROLE IN ORIGINAL CASES

New Jersey's attack on the Historian Brief appears to be chiefly premised on a myopic view of this Court's role in original cases. New Jersey argues as if the reports filed by the Special Master in this case on March 31 and May 1, 1997 (collectively, the "Report" or "R.") were final determinations of an Article III court, now on appeal to this Court solely on the basis of a definitive (and presumptively closed) appellate record. This is not the case. In original cases, a Special Master's report is merely a recommended ruling which remains subject to full *de novo* review by this Court, which, in turn, retains ultimate responsibility for both findings of fact and conclusions of law. See *United States v. Maine*, 475 U.S. 89, 97 (1986); *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984); *Mississippi v. Arkansas*, 415 U.S. 289, 294 (1974); *United States v. Texas*, 339 U.S. 707, 715, *modified*, 340 U.S. 848 (1950).

In this context, the "record" is whatever is ultimately before this Court when—after briefing, argument, and any independent inquiries—the Court issues its final decision. It is not, as New Jersey would argue, solely what is put before the Court by the Special Master in an initial report on the merits. To the contrary, this Court has often supplemented the record created by a Special Master of its own accord, see *Colorado v. New Mexico*, 467 U.S. 310, 324 (1984); *Maryland v. Louisiana*, 451 U.S. 725, 759-60 (1981), or remanded a case for additional fact-finding on issues overlooked by a Special Master. See *Delaware v. New York*, 507 U.S. 490, 510

(1993); *Texas v. New Mexico*, 482 U.S. 124, 135 (1987); *Colorado v. New Mexico*, 467 U.S. 310, 314 (1984); *Idaho v. Oregon*, 444 U.S. 380, 393 (1980); *Pennsylvania v. New York*, 407 U.S. 206, 215 (1972).

The Court has gone to such lengths because, as even the Special Master acknowledges, "in original jurisdiction cases, full and liberal factual development is important because of the lofty historical, territorial, and financial implications of these cases to the states involved." (R. at 24 citing *United States v. Texas*, 339 U.S. 707, 715 (1950)). There can be little doubt that the future of Ellis Island raises such "lofty" implications, so it is reasonable to assume, as have the Historian Amici, that the Court will wish to exhaust all viable avenues of inquiry before deciding this case. (R. at 33 ("Few controversies ever to come before the Supreme Court have a stronger hold on our history and traditions."))

It is in this context that the Historian Amici urge the Court "to take whatever measures it deems necessary to ensure that the record is complete" before deciding this case. And, it is for this reason that the Historian Brief undertakes to present the Court with relevant factual and legal considerations that are not to be found in the Report or the record of proceedings before the Special Master.

ROLE OF AMICI CURIAE

In so doing, the Proposed Historian Amici furnish to this Court precisely the type of "help" that is contemplated by Supreme Court Rule 37, which provides that an amicus brief should "bring to the attention of the Court relevant matter not already brought to its attention by the parties." Supreme Court Rule 37.1. Under this standard, the scope of an amicus brief is not limited to the facts relied upon or the arguments made by the party in whose support the brief is

filed. To the contrary, the Court has many times "rel[ied] on factual information, cases or analytical approaches provided only by an amicus." Robert L. Stern, *et al.*, *Supreme Court Practice* 564 (1993); *see, e.g., O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987); *Turner v. Safley*, 482 U.S. 78, 93, 95 (1987); *Maryland v. Craig*, 497 U.S. 836, 855-58 (1990); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 589 n.3 (1986) (Stevens, J., dissenting); *Elgin, J. & E. Ry. Co. v. Burley*, 327 U.S. 661, 669-75 (1946) (Frankfurter, J., dissenting). On rare occasions, this Court has even decided cases on a ground "raised only in an amicus brief." *Teague v. Lane*, 489 U.S. 288, 300 (1989); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991); *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961).

The Historian Brief fully satisfies the Rule 37 standard. As New Jersey several times points out, neither New Jersey nor New York had previously brought to the Court's attention the existence of (what New Jersey now concedes to be) the plainly relevant factual information proffered in the Historian Brief. Regardless of how this came to be the case, such information, together with the potential sources for additional information pointed to by the Amici, need to be before this Court in order for it to reach an informed resolution of this dispute. The Historian Brief, if leave is granted for its filing, will ensure that it is.

OBJECTIVE OF HISTORIAN BRIEF

While all of the foregoing suggests that an amicus brief in an original case could play a significant role in the Court's decisionmaking process, the Historian Brief is hardly this ambitious. Its simple objective is twofold—(1) to present the Court with facts that support conclusions as to several significant issues that differ from those in the Report and (2) to point out to the Court that various, relatively obvious avenues of inquiry exist that have not yet been

pursued. New Jersey's contrary contentions notwithstanding, the Historian Brief does not seek to undermine the adversarial process by (a) asking this Court to rely on evidence that New Jersey has not had to opportunity to controvert or (b) seeking a remedy that neither State has requested.

The limited efforts of the Amici in the short time between filing of the Report and the filing of its proposed Brief uncovered several, previously-unexplored sources of relevant information. Much of this information is derived from published sources (the more than 25 books and articles cited in the Brief's Table of Authorities) of which this Court can plainly take judicial notice. Also located, however, was a variety of contemporaneous letters and memoranda that shed new light on the activities, motives and mindsets of the Compact's drafters. Proposed Historian Amici believe that these documents (most of which have been cited in published sources) should be before the Court, but, out of an abundance of caution, Proposed Amici proffered these documents with a clearly-stated caveat: either the Court could take judicial notice of these "historical" documents, as otherwise incontrovertible, and thus consider them for the propositions they support, or "if the Court [was] not so inclined, it [could], at the very least, look to such documents as evidence that avenues of inquiry exist that have not yet been pursued." Brief at 7 n.5. New Jersey's mischaracterization of Proposed Amici's stated intent aside, the Court should look to any "new evidence" in the Historian Brief for what it is—a good faith proffer of information that any reasonable person would have expected to have been dealt with in the Report.

Finally, Proposed Amici do not in any way purport to seek a remedy that neither State has requested. To the contrary, Proposed Amici seek the same remedy sought by the State of New York—the continued exercise by New York of sovereignty over Ellis Island. New York


and the Historian Amici simply propose different routes for the Court to reach this outcome. New York points the Court to the plain meaning of Article II and record evidence of prescription and acquiescence, while the Historian Amici focus on the historical context of Article III. The chief difference between the two approaches is that for purposes of New York's arguments, the record is inarguably complete, whereas for purposes of the Historian Amici's arguments, it may not be. However—New Jersey's contentions to the contrary notwithstanding—whether or not the record is complete is for this Court, and not New Jersey, New York or the Historian Amici, to decide. Hence, Proposed Amici properly urge the Court to take whatever measures are necessary to satisfy itself that all valid avenues of inquiry have been exhausted before finally resolving the factually complex and politically sensitive issues raised by this case.

WHEREFORE, Proposed Historian Amici respectfully request that the Objections of the State of New Jersey be overruled and leave be granted to file the Historian Brief.

Dated: New York, New York
August 20, 1997

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CERTIFICATE OF SERVICE

I hereby certify that the annexed Response of *Amici Curiae* New-York Historical Society, Society for New York City History, Arthur M. Schlesinger, Jr., Richard C. Wade, and Kenneth T. Jackson to Objections of The State of New Jersey to Motion For Leave to File Brief as *Amici Curiae* was served via U.S. Mail on August 20, 1997, upon the following counsel of record:

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